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Free Enterprise - Price Discrimination Under the Clayton Act

Merwin M. Brandon Jr.

FREE ENTERPRISE — PRICE DISCRIMINATION UNDER THE CLAYTON ACT

Respondent, a brewer with nation-wide sales, lowered the wholesale price of its beer in St. Louis, but not in other areas. This removed the price differential that had existed in St. Louis between respondent's wholesale price and the wholesale prices of other brewers in the area. As a consequence, respondent substantially increased its share of the market. An action brought by the Federal Trade Commission resulted in the issuance of a cease-and-desist order based on a finding that respondent's lowering of prices in only one geographical area was a price discrimination within the meaning of Section 2 of the Clayton Act as amended, and that the evidence indicated that such price discrimination tended to destroy competition between respondent and competing brewers in that area. The Seventh Circuit Court of Appeals reversed the Commission on the ground that the price cuts in the area were not discriminatory under the Clayton Act.[1] Since the reductions in price were granted uniformly to all the area purchasers, none of the competing purchasers thereby secured an advantage. On certiorari granted to resolve a conflict in the circuit courts of appeal as to the proper interpretation of Section 2(a) of the Clayton Act as amended, the United States Supreme Court, *held*, reversed and remanded to consider evidence in defense of the discrimination. A uniform price reduction by a national seller in one particular geographical area is a price discrimination within the meaning of Section 2(a) of the Clayton Act — a price discrimination being merely a price difference. *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536 (1960).

The original Clayton Act of 1914[2] was construed to forbid

of Mr. Justice Harlan is not utilized, then on a retrial the issue to be presented to the jury will be whether or not the rail with slime on it was reasonably suitable for the use intended. See Michalic v. Cleveland Tankers, Inc., 81 Sup. Ct. 6 (1960).

1. Anheuser-Busch v. FTC, 265 F.2d 677 (7th Cir. 1959). The decision was based on the theory that a difference in price was not a discrimination in price unless a competitive relationship existed between the parties paying the different prices so that the parties paying the lower price received an advantage. Since all the purchasers in the St. Louis area paid the same price regardless of which local brewers they competed with, the court found no discrimination against Anheuser-Busch's competitors. *But see* Atlas Building Products Co. v. Diamond Block & Gravel Co., 269 F.2d 950 (10th Cir. 1959), where the court expressly rejected the reasoning of the seventh circuit in *Anheuser-Busch*, and said that "different purchasers" as stated in the Clayton Act as amended did not mean competing purchasers.

2. Clayton Act, c. 323, § 2, 38 STAT. 730 (1914): "That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either di-

discriminations in price which affected the competition of purchasers[3] as well as the competition of other sellers.[4] The courts considered a mere differential in price as constituting a discrimination in price.

That the courts were correct in interpreting the Clayton Act prior to amendment to mean a differential in price was a discrimination in price is supported by the legislative history of the act. As reported from the House Committee on the Judiciary, the Clayton Act proscribed geographic price discriminations designed to force local competitors of the seller or the favored purchaser out of business.[5] The House Judiciary's majority report said the specific practice sought to be prohibited was that which corporations used:

> "To destroy competition . . . and render unprofitable the business of competitors by selling . . . goods, wares, and merchandise at a less price in the particular communities where their rivals are engaged in business than at other places throughout the country. Every concern that engages in this evil practice must of necessity recoup its losses in the particular communities or sections where their commodities are sold below cost or without a fair profit by raising the price of this same class of commodities above their fair market value in other sections or communities. Such a system or

rectly or indirectly to discriminate in price between different purchasers of commodities, which commodities are sold for use, consumption or resale within the United States. . . . Where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce: PROVIDED, That nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality, or quantity of the commodity sold, or that makes only due allowance for difference in the cost of selling, or transportation, or discrimination in price in the same or different communities made in good faith to meet competition."

3. George Van Camp & Sons Co. v. American Can Co., 278 U.S. 245, 254 (1929). The defendant sold at a 20% discount to a competitor of the plaintiff, and the Court stated that "a discrimination in prices exacted by the seller from different purchasers of similar goods, is no less clear when it produces the evil in respect of the line of commerce in which they are engaged than when it produces the evil in respect of the line of commerce in which the seller is engaged." Implicit in the statement by the Court is that recognition that price discrimination which destroys the seller's competition is proscribed by the act.

4. In Porto Rican American Tobacco Co. v. American Tobacco Co., 30 F.2d 234 (2d Cir. 1929), the defendant was selling its cigarets at a loss of $175,000 a year in Puerto Rico, but making a profit on its sales in the United States in order to force plaintiff out of business. The court found this proscribed by the Clayton Act. In Mennen Co. v. FTC, 288 Fed. 774 (2d Cir. 1923), while the court found no violation of the Clayton Act, it did state that the purpose of the act was to eliminate the evil of local price cutting by a large corporation which destroyed small, regional businesses. See also S. S. Kresge Co. v. Champion Spark Plug Co., 3 F.2d 415 (6th Cir. 1925).

5. H.R. Rep. No. 627, 63rd Cong., 2d Sess. 1 (1914).

practice is . . . manifestly unfair and unjust, not only to competitors who are directly injured thereby, but to the general public."[6]

Even the House minority views in opposition to the bill concluded that the purpose of the section was to force the national manufacturer or jobber to lower his prices in all areas in order to meet price competition in a particular area, or else be subjected to prosecution for price discrimination.[7] The Senate altered the House bill by enlarging the proviso to withdraw discrimination in price conducted in good faith to meet competition from prohibited conduct and made several technical changes.[8] The Senate also deleted the criminal sanctions of a fine and/or imprisonment found in the House version because they were believed to be too harsh for an act of such an experimental nature as price control.[9]

In 1936 Congress enacted the Robinson-Patman Act. Part of this act amended Section 2 of the Clayton Act, enlarging its scope to protect the competitor, as well as competition, from injury, and specifically prohibiting some business practices considered deleterious to fair competitive practices.[10] Another section of the Robinson-Patman Act prohibited geographic price differences designed to destroy competition or eliminate a competitor and provided criminal penalties.[11]

The legislative history of the Robinson-Patman Act indicates that no change in the interpretation of the Clayton Act regarding the meaning of "price discrimination" was intended by Con-

6. *Id.* at 8.

7. *Id.* at 3. One of the minority reports stated that: "The National Government is entering . . . upon the policy of enforcing uniformity in prices to all persons and all sections."

8. S. Rep. No. 698, 63rd Cong., 2d Sess. 1, 54-55 (1914). The proposed Senate version of Section 2 read: "That it shall be unlawful for any person engaged in commerce either directly or indirectly to discriminate in price between different purchasers of commodities, which commodities are sold for use, consumption, or resale . . . with the purpose or intent thereby to destroy or wrongfully injure the business of a competitor, of either such purchaser or seller, *provided*: That nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality, or quantity of the commodity sold, or that makes only due allowance for difference in the cost of selling or transportation or discrimination in price in the same or different communities made in good faith to meet competition and not intended to create monopoly: And provided further, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade."

9. *Id.* at 43.

10. 15 U.S.C. § 13(a) (1936).

11. 15 U.S.C. § 13a (1936).

gress. In the analysis of the price discrimination aspects of the bill, the House Committee on the Judiciary said:

> "Discriminations in excess of sound economic difference between the customers concerned, in the treatment accorded them, involve generally an element of loss, whether only of the necessary minimum of profits or of actual costs, that must be recouped from the business of customers not granted them. When granted by a given seller to his customers in other States, and denied to those within the State, they involve the use of interstate commerce to the burden and injury of the latter. When granted to customers within the State and denied to those beyond, they involve conversely a direct resulting burden upon his interstate commerce with the latter. Both are within the proper and well-recognized power of Congress to suppress."[12]

Since the provisos to the act contain supposed justifications for price discriminations, it seems apparent that they alone must be considered the "sound economic difference[s]" referred to above.[13] In referring to the amendment of Section 2(a) of the Clayton Act by the Robinson-Patman Act, which limited the showing of a good faith meeting of competition to rebutting a prima facie case of price discrimination, the report stated:

> "It should be noted that while the seller is permitted to meet local competition, it does not permit him to cut local prices until his competitor has first offered lower prices, and then he can go no further than to meet those prices. If he goes further, he must do so likewise with all his other customers, or make himself liable to all of the penalties of the act, including treble damages."[14]

The conference committee concluded that a difference in price among different localities was a discrimination in price within the meaning of Section 2(a). Section 3 of the Robinson-Patman Act concerning geographical price discriminations was considered as an additional and distinct means of dealing with geographic price discrimination. In referring to the effect of Sec-

12. H.R. Rep. No. 2287, 74th Cong., 2d Sess. 8 (1936). For a discussion of "price discrimination," see AUSTIN, PRICE DISCRIMINATION AND RELATED PROBLEMS UNDER THE ROBINSON-PATMAN ACT 18-22 (2d ed. 1959); REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 155-70 (1955).

13. PATMAN, THE ROBINSON-PATMAN ACT 39-48 (1938).

14. H.R. Rep. No. 2287, 74th Cong., 2d Sess. 8 (1936).

tion 3 of the Robinson-Patman Act on the amendment to the Clayton Act, the conference managers stated that Section 3:

> ". . . authorized nothing which that amendment prohibits, and takes nothing from it. On the contrary, where only civil remedies and liabilities attach to violations of the amendment . . . section 3 sets up special prohibitions as to the particular offenses therein described and attaches to them also the criminal penalties therein provided."[15]

Notwithstanding the evident legislative history that indicates Section 3 of the Robinson-Patman Act was meant to be a special sanction against geographic price discrimination, rather than to supplant Section 2(a) of the Clayton Act,[16] apparent uncertainty has been created in the courts as to the proper scope of Section 2(a) of the Clayton Act. While an early case allowed the recovery of treble damages under Section 3 of the Robinson-Patman Act,[17] a later case held that Section 3 was not an anti-trust act so as to permit civil action for treble damages, thus restricting its application to criminal enforcement.[18] After the latter de-

15. H.R. Rep. No. 2951, 74th Cong., 2d Sess. 8 (1936). Compare this provision, 15 U.S.C. § 13a (1936), with the original proposal by the House for the Clayton Act in 1914, which stated: "That any person engaged in commerce who shall either directly or indirectly discriminate in price between different purchasers of commodities in the same or different sections or communities, which commodities are sold for use, consumption, or resale . . . with the purpose or intent to thereby destroy or wrongfully injure the business of a competitor of either such purchaser or seller shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding $5000, or by imprisonment not exceeding one year, or both, in the discretion of the court: PROVIDED, That nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality, or quantity of the commodity sold, or that makes only due allowance for differences in the cost of transportation." H.R. Rep. No. 627, 63rd Cong., 2d Sess. 1-2 (1914).

16. H.R. Rep. No. 2951, 74th Cong., 2d Sess. 6-8 (1936) (Utterback, "Price Discrimination").

17. Moore v. Mead's Fine Bread Co., 348 U.S. 115, 118 (1954). In relying on both Section 2(a) of the Clayton Act (15 U.S.C. § 13(a) (1936)) and Section 3 of the Robinson-Patman Act (15 U.S.C. § 13a (1936)) the Court said: "The destruction of a competitor was plainly established, as required by the amended § 2(a) of the Clayton Act; and the evidence to support a finding of purpose to eliminate a competitor, as required by § 3 of the Robinson-Patman Act, was ample." Treble damages were allowed. See also Ben Hur Coal Co. v. Wells, 242 F.2d 481 (10th Cir. 1957) and Klein v. Lionel Corp., 237 F.2d 13 (3d Cir. 1956) (private actions brought under 15 U.S.C. § 13a (1936), the section of the Robinson-Patman Act imposing criminal penalties).

18. Nashville Milk Co. v. Carnation Co., 355 U.S. 373, 377 (1958). The Supreme Court affirmed a dismissal of a treble damage action brought under Section 3, stating as to Section 3 of the Robinson-Patman Act: "[T]his section, in contrast to § 1 of the Robinson-Patman Act, does not on its face amend the Clayton Act. Further, § 3 contains only penal sanctions for violation of its provisions; in the absence of a clear expression of congressional intent to the contrary, these sanctions should under familiar principles be considered exclusive, rather than supplemented by civil sanctions of a distinct statute." Actually, the case resolved

cision, it was clear that any civil action relating to geographic price discriminations must be brought, if at all, under Section 2 of the Clayton Act as amended. In *FTC v. Cement Institute*[19] the Supreme Court apparently upheld a civil action under Section 2(a) of the Clayton Act for geographical price discrimination. However, the lower federal courts have not been uniform in their decisions. Some have held geographical price differences are discriminations within the act[20] and some have held that they are not.[21] Certiorari was granted by the Supreme Court in the instant case to resolve this conflict. The court of appeals, in determining that the lowering of price in the St. Louis area by Anheuser-Busch was not prohibited conduct under the Clay-

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itself on the determination that the Robinson-Patman Act was not an "anti-trust" act under the sections granting civil enforcement and treble damage actions to those persons injured by violations of the anti-trust acts.

19. 333 U.S. 683 (1948). See Corn Products Refining Co. v. FTC, 324 U.S. 726 (1945), where the contention that the prohibition of Section 2(a) of the Clayton Act was directed only to competing buyers in the same place was specifically rejected. See also FTC v. A. E. Staley Mfg. Co., 324 U.S. 746 (1945). In connection with the basing point system as price discrimination, see SIMON, GEOGRAPHIC PRICING PRACTICES (BASING-POINT SELLING) (1950) for a comprehensive treatment of that aspect of price discrimination.

20. In Atlas Bldg. Products Co. v. Diamond Block & Gravel Co., 269 F.2d 950 (10th Cir. 1959), the court refused the defendant's contention that to be actionable under 15 U.S.C. § 13(a) (1936) discriminations must be between purchasers in competition with one another, saying that the purpose of the section was to prevent a seller from charging various purchasers different prices for the same type of products when the resultant effect was to lessen competition. For apparently erroneous dictum, see Baim & Blank Inc. v. Philco Corp., 148 F. Supp. 541, 543 (E.D.N.Y. 1957), wherein the court stated: "Plaintiff does not dispute that one cannot have a cause of action for violation under section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C.A. sec. 13, unless one is an actual purchaser from the person charged with the discrimination." In Samuel H. Moss, Inc. v. FTC, 148 F.2d 378 (2d Cir. 1945), the petitioner sold in interstate commerce at lower prices to some purchasers than to others. The Commission's contention, which was sustained by the court, was that having shown this, the burden was upon the seller to justify such conduct. In E. B. Muller & Co. v. FTC, 142 F.2d 511 (6th Cir. 1944), the court here specifically found that the petitioner had sold at lower prices in New Orleans than in other parts of the country, and held that this was a discrimination in price, which had the proscribed effect of ruining the competitor of Muller. See also Elgin Corp. v. Atlas Bldg. Products Co., 251 F.2d 7 (10th Cir. 1958).

21. Balian Ice Cream Co. v. Arden Farms Co., 231 F.2d 356 (9th Cir. 1955), cert. denied, 350 U.S. 991 (1956). This was an action against an interstate dealer for selling locally at a price below what the dealer charged in other areas. In affirming for the defendant, the Court stated: "It is also broadly stated in the argument that a differential in price in and of itself constitutes discrimination within the meaning of section 2(a) of the Clayton Act, as amended." *Id.* at 367. "There is no presumption set up anywhere that, merely because there is a differential in various areas, necessarily a price discrimination exists." *Id.* at 368. While the distinction may be fine, it seems that a discrimination does in fact exist, but that the proscribed results of such a discrimination are missing so as to take it out of the sphere of Section 2(a) prohibitions. Anheuser-Busch, Inc. v. FTC, 265 F.2d 677 (7th Cir. 1959). See, however, PATMAN, THE ROBINSON-PATMAN ACT 39-48 (1938), wherein apparently any difference in price is a discrimination, unless economically justified by cost savings.

ton Act, found no relationship between the purchasers which made a mere difference in price a discrimination in price. In essence they concluded that unless a competitive relationship existed among those purchasers paying different prices, the price difference did not constitute a price discrimination.[22]

The Supreme Court, by its holding in the instant case, has definitely established that a "price discrimination" within the meaning of the Clayton Act as amended is any price difference established by granting reductions in one area without proportionate reductions in all other areas. That this was the intention of the Congress appears evident, even though it results in a policy of strict price uniformity. However, such a price discrimination establishes only a prima facie violation of the act if harm does, or is likely to, occur to competition or to a competitor. This may be conclusively rebutted if the price discrimination meets the standards of Section 2(b) for a good faith meeting of a competitor's prices.[23]

The decision, which limits its scope to the narrow point of defining price discrimination, should lessen the confusion surrounding the interpretation of Section 2(a), and provide a definite standard on which businessmen and lawyers can rely. However, such a standard appears to require a complete uniformity of pricing unless a business successfully carries the burden of proving that any differences are justified. The effect of the decision may best be appreciated by considering the following possibility: If a manufacturer sells nationally at varying prices, he may conceivably be forced to prove that all of the price differences are caused by variations in costs, or that no harm results to competition, or that his prices are justifiable by a good faith meeting of competition.

Whether or not one considers the Clayton and Robinson-Patman Acts desirable legislation, it is practically impossible to

22. Anheuser-Busch Inc. v. FTC, 265 F.2d 677, 681 (7th Cir. 1959): "Where two purchasers from a seller are competing with each other, that competition creates a relationship that entitles them to comparable treatment as to price, without which treatment there would be a discrimination in price within the meaning of section 2(a). On the other hand, in a case like this, where the purchasers from a seller are located in different areas of the country and are not in competition with each other, there is generally no relationship which entitles them to be charged the same prices."

23. Standard Oil Co. v. FTC, 340 U.S. 231 (1951) (beginning at page 251 the dissenting opinion gives a good review of the legislative history). The writer is forced to conclude that the legislative history is in favor of the dissent. See PATMAN, THE ROBINSON-PATMAN ACT 40 (1938); McGee, *Predatory Price Cutting: The Standard Oil (N.J.) Case*, 1 J. L. & EC. 137 (1958).

disagree with the Court as to what is the proper interpretation of Section 2(a) on the facts of the instant case. The act is being interpreted to prevent a national seller from engaging in predatory price cutting to eliminate local competition. While the decision does not differentiate between selling at a loss or at less than "fair market value," and selling at a price which returns a slightly smaller profit than is normally received, the prior cases and legislative history[24] indicate that a possible argument might be made on the point that a fair profit was being returned on the lower sales price. Apparently this aspect was not considered in the instant case, so it remains as a tenuous loophole for a discriminating national seller.

Merwin M. Brandon, Jr.

MINERAL RIGHTS — UNITIZATION — PRESCRIPTION

Defendant conveyed to plaintiff a tract of land and reserved a mineral servitude. Plaintiff sued to have the servitude declared extinguished, contending that there had been no development on the land for a period exceeding ten years, and consequently that the servitude had prescribed for lack of user. Defendant contended, however, that a voluntary unitization agreement, approved by the Commissioner of Conservation, which unitized the entire tract in question with a producing tract, had the effect of forced unitization resulting in interruption of liberative prescription. The evidence showed that the unitization agreement was for purpose of secondary recovery, and was not signed by plaintiff landowner. The district court entered judgment for defendant and on appeal to the court of appeal, *held*, reversed. The Conservation Commissioner's approval of the unitization agreement was not such an order as to effect a forced unitization of the area. As the unitization agreement was voluntary, it was insufficient, without user of the servitude or express acknowledgment by the landowner of the interruption of prescription, to prevent the mineral reservation from prescribing. *Alexander v. Holt*, 116 So.2d 532 (La. App. 1959).

Although a mineral servitude cannot be acquired by acquisitive prescription,[1] it is well settled in Louisiana that mineral

24. See notes 4 and 5 *supra*.
1. Savage v. Packard, 218 La. 637, 50 So.2d 298 (1950).